82-1255

No. _____

Office Supreme Court, U.S.
FILED
JAN 7 1983
ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL O. MYERS,
ANGELO J. ERRICHETTI,
LOUIS JOHANSON,
Petitioners,

-vs-

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

ALAN DEXTER BOWMAN
STEVEN H. GIFIS
One Palmer Square, Suite 410
Princeton, N.J. 08540

Attorneys for Petitioners,
Myers, Errichetti and
Johanson

RAYMOND A. BROWN
HENRY F. FURST
Brown, Brown & Furst, P.A.
Gateway One
Newark, N.J. 07102

Attorneys for Petitioner,
Errichetti

JOHN J. DUFFY
2800 Two Girard Plaza
Philadelphia, Pa. 19107

Attorneys for Petitioner,
Johanson

ALAN DEXTER BOWMAN
STEVEN H. GIFIS
HENRY F. FURST
NEIL JOKELSON
ROCHELLE NEWMAN

On the Petition

NEIL JOKELSON
ROCHELLE NEWMAN
Jokelson & Rosen
215 South Broad Street
Philadelphia, Pa.

Attorneys for Petitioner,
Myers

THE SUPERIOR APPELLATE PRINTING COMPANY
P O BOX 383
CRANBURY, N.J. 08512
AREA CODE 609
443-4202

QUESTIONS PRESENTED

1. Whether A Due Process Defense To Conviction Is Mandated By The Fifth Amendment And, If So, Whether Petitioners' Assertions Of The Defense With Respect To The Conduct Of Law Enforcement Operatives In The ABSCAM Sting Operation Requires Dismissal Of The Indictment Or In The Alternative Suppression Of Evidence Derived From Unconstitutional Investigatory Methodology?

2. Whether the Speech or Debate Clause And The Doctrine Of Separation Of Powers Immunize Petitioner Myers From A Prosecution Stemming From A Sting Operation Directed At Congress Absent Any Probable Cause Or Predicate Indicating That Either He Or Other Congresman Were Involved In Criminal Conduct?

3. Whether The Admission Of Subsequent Criminal Acts As Proof Of Intent On An Earlier Occasion Is Violative Of The Right To A Fair Trial?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	iii
Table of Authorities	vii
Opinion Below	1
Jurisdiction	2
Constitutional, Statutory and Rule Provisions Involved	2
I. Statement of the Case	2
i. Procedural Background	2
ii. Introduction	4
iii. ABSCAM - Its Genesis, Growth and Development	6
a. Introduction	6
b. The Manner Of Recruitment Of Melvin Weinberg And His Conduct	8
iv. Factual Background	12
a. The Initial Transaction in Myers	12
b. The Second Transaction in Myers	17
II. The Jurisprudential Significance Of The Arguments To Be Raised Before The Court	19

CONTENTS

		PAGE
a.	The Due Process Violation	19
b.	Congressman Myers' Immunity Based On The Speech Or Debate Clause And The Separation Of Powers Doctrine ..	24
c.	Admission Of Subsequent Acts As Proof Of Intent On A Prior Occasion	27

Reasons For Granting The Writ

POINT I	CERTIORARI SHOULD BE GRANTED TO PERMIT THIS COURT TO DETERMINE WHETHER A DUE PROCESS DEFENSE EXISTS WITHIN OUR CONSTITUTION. IF SUCH A DEFENSE IS FOUND TO EXIST THIS COURT MUST SCRUTINIZE THE TACTICS UTILIZED BY THE GOVERNMENT AND STATE WHETHER THE OVER-REACHING AND CREATION OF CRIME WHICH EARMARKED THE ABSCAM INVESTIGATION VIOLATED PETITIONERS' RIGHTS REQUIRING DISMISSAL OF THE INDICTMENT OR IN THE ALTERNATIVE SUPPRESSION OF ALL EVIDENCE DERIVED FROM ILLEGAL TACTICS. ..	30
i.	The Due Process Focus	32
ii.	The Analysis Undertaken By The Second Circuit	35

CONTENTS

		PAGE
a.	Creation of Crimes	35
b.	Size Of Inducements	36
c.	Coaching	37
d.	Impairment Of Accurate Fact-finding	38
iii.	The Thrust of ABSCAM Was The Manufacture Of Criminal Offenses	39
iv.	The Manner Of Supervision Of The ABSCAM Investigation And The Means Of Generating Evidence Was So Deficient That It Acted To Suppress Compilation Of Exculpatory Evidence And Rendered Defendants Unable To Fairly Defend In Violation Of Due Process	47
POINT II	CERTIORARI SHOULD BE GRANTED TO FACILITATE A DETERMINATION BY THIS COURT AS TO WHETHER THE INDICTMENT AND PROSECUTION OF CONGRESSMAN MYERS VIOLATED HIS IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE. AND, THIS COURT MUST ALSO DETERMINE WHETHER THE CRIMINAL INVESTIGATION OF A MEMBER OF CONGRESS AS PART OF THE EXECUTIVE'S STING OPERATION WITHOUT A	

CONTENTS

		PAGE
	PROBABLE CAUSE BASIS VIOLATED THE SEPARATION OF POWERS DOCTRINES.	49
POINT III	THIS COURT SHOULD GRANT CERTIORARI TO ISSUE A RULE AS TO THE ADMISSIBILITY INTO EVIDENCE OF PROOF OF CRIMINAL INTENT ACTS WHICH OCCUR SUBSEQUENT TO TERMINATION OF THE CONSPIRACY AND SUBSTANTIVE OFFENSES CHARGED IN THE INDICTMENT.	56
Conclusion		65

TABLE OF AUTHORITIES

PAGE

Cases Cited:

Archer v. Commissioner of Corrections, 646 F.2d 44, 47 (2 Cir. 1981), cert. den. 454 U.S. 851 (1981) 21

Bruce v. Alaska, 612 P.2d 1012, 1014 (Sup. Ct. 1980) 22

California v. McIntire, 591 P.2d 527, 528 (Sup. Ct. 1979) 22

Cf. People v. Isacceson, 878 N.E. 2d 78 (Ct. App. 1978) 45

Greene v. United States, 454 F.2d 783 (9 Cir. 1971) 44

Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) ..... 5, passim

Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) 55

Michigan v. Wisneski, 292 N.W. 2d 196, 198 (Ct. App. 1980) 22

Minnesota v. Ford, 276 N.W. 2d 178, 182 (Sup. Ct. 1979) 22

New Jersey v. Molnar, 81 N.J. 475, 484 (1980) 22

Norman v. Texas, 588 S.W. 2d 340, 346 (Ct. App. 1973) 22

North Dakota v. Berger, 285 N.W. 2d 533, 539 (Sup. Ct. 1979) 22

Ohio v. Metcalf, 396 N.E. 2d 786, 791 (Ct. App. 1977) 22

AUTHORITIES

	PAGE
Cases Cited Cont'd:	
Pacelli v. United States, 588 F.2d 167, 173 (D.C. Cir. 1979)	58
Pennsylvania v. Jones, 363 A.2d 1281, 1284 (Super. Ct. 1976)	22
Sorrells v. United States, 287 U.S. 435, 441 (1932)	51
Tzimopaulous v. United States, 554 F.2d 1216, 1217-1218 (1 Cir. 1977)	40
United States v. Bermudez, 526 F.2d 89, 95 (2 Cir. 1975)	57
United States v. Bocra, 623 F.2d 281, 288-289 (3 Cir. 1980)	40
United States v. Boyd, 595 F.2d 120 (3 Cir. 1978)	58,59,60
United States v. Briola, 660 F.2d 763, 764 (10 Cir. 1981)	44
United States v. Brewster, 408 U.S. 59 (1972)	54
United States v. Brown, 635 F.2d 1207, 1212-1214 (6 Cir. 1981)	45
United States v. Catanzaro, 407 F.2d 998 (3rd Cir. 1969)	40
United States v. Childs, 598 F.2d 169, 173 (D.C. Cir. 1979)	58
United States v. Fierson, 419 F.2d 1020, 1022 (7 Cir. 1969)	57

AUTHORITIES

PAGE

Cases Cited Cont'd:

United States v. Gallo, 543 F.2d 361, 364 (D.C. Cir. 1976) 58

United States v. Gonzalez, 539 F.2d 1238, 1239-1240 (9 Cir. 1976) 45

United States v. Helstoski, 442 U.S. 477 (1979) 26, 51

United States v. Helstoski, Crim. No. 76-201 (D.N.J. Feb. 27, 1980) 26

United States v. Jannotti, 673 F.2d 578 (3 Cir. 1982) 41,48,54

Cf. United States v. Jimenez, 613 F.2d 1573, 1376 (5 Cir. 1980) 60

United States v. Johnson, 383 U.S. 177, 178 (1966) 26, 54

United States v. King, 587 F.2d 956, 962 (9 Cir. 1978) 58

United States v. Krezdorn, 639 F.2d 1327, 1331 (5 Cir. 1981) 63

United States v. Mack, 643 F.2d 1119, 1121-1122 (5 Cir. 1981) 57

United States v. Myers, 572 F. Supp. 1206 (E.D.N.Y. 1981) 4, 39

United States v. Myers, 635 F.2d 932, (2 Cir. 1980) 3,passim

United States v. Payner, 447 U.S. 727 (1980) 48

AUTHORITIES

PAGE

Cases Cited Cont'd:

United States v. Powell, 587 F.2d 443, 449 (9 Cir. 1978) 60

United States v. Russell, 411 U.S. 423, 426 (1973) 42,44,51

Utah v. Taylor, 599 P.2d 496, 503 (Sup. Ct. 1979) 22

Rule Cited:

Fed. R. Evid. 404(b) 56,passim

Statutes Cited:

18 U.S.C.A. §2 ..... 2, 3

18 U.S.C.A. §201 ..... 2, 3

18 U.S.C.A. §371 ..... 2, 3

18 U.S.C.A. §1952 ..... 2, 3

28 U.S.C.A. Sec. 1254(1) 2

U.S.C.A. Const. Amend. 5 2

Other Authorities Cited:

Federalist No. 48 (Cooke Ed.) 25

McCormick, Evidence Sec. 157, at 327, n.2 (1954) 57

AUTHORITIES

PAGE

Other Authorities Cited Cont'd:

Weinstein and Berger, Weinstein's Evidence Vol. 2, Sec. 404 [08] at 404-45 57

Wigmore, Evidence Sec. 302 (3d Ed. 1940) 57

In The

Supreme Court of the United States

October Term, 1982

MICHAEL O. MYERS

ANGELO ERRICHETTI

LOUIS JOHANSON

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 3, 1982.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is appended to this Petition as Appendix A. That opinion is published at 692 F.2d 823 (2 Cir. 1982)

Jurisdiction

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Second Circuit is based on 28 U.S.C.A. Sec. 1254(1).

Constitutional, Statutory and Rule Provisions Involved

Petitioner seeks review of issues of law arising under 18 U.S.C.A. §201, 18 U.S.C.A. §371, 18 U.S.C.A. §1952, 18 U.S.C.A. §2 and U.S.C.A. Const. Amend. 5. They are appended to this petition as Appendix B.

I.

STATEMENT OF THE CASE

i.

Procedural Background

On May 27, 1980 Indictment No. CR-80-00249 was filed. That indictment charged petitioners Angelo Errichetti, Michael O. Myers and Louis Johanson with:

conspiracy in violation of 18 U.S.C.A. §371; bribery in violation of 18 U.S.C.A. §201(c) and §2 and, traveling in interstate commerce to facilitate unlawful activity in violation of 18 U.S.C.A. §1952 and 18 U.S.C.A. §2.[1] Howard Criden was also named in the indictment.

A pretrial motion to dismiss was denied. The Second Circuit affirmed that denial in an opinion which discussed objections to the prosecution based on the speech or debate clause and other related issues. United States v. Myers, 635 F.2d 932 (2 Cir. 1980). A pretrial decision was also made to conduct an evidentiary hering respecting due process concerns subsequent to trial. Trial ultimately commenced on August 11, 1980 before the Honorable George C. Pratt, U.S.D.J. and a jury. Thereafter, on August 29, 1980 guilty verdicts were returned as to petitioners with respect to each count in the indictment. On August 13, 1981 Judge Pratt imposed sentence on petitioners. Judge Pratt

---

[1] Petitioner herein specifically adopt all arguments raised in the petition for certiorari to be filed on behalf of petitioner Howard L. Criden.

imposed aggregate sentences of three years imprisonment on petitioners Myers and Johanson and an aggregate sentence of six years imprisonment on petitioner Errichetti.

Subsequent to trial, an extensive hearing was conducted before Judge Pratt respecting due process issues. On July 24, 1981 Judge Pratt issued an opinion denying any relief to petitioners on due process grounds. See United States v. Myers, 572 F.Supp. 1206 (E.D.N.Y. 1981). Timely notices of appeal were filed respecting issues raised both within the trial and the due process hearing. On September 3, 1982 the Second Circuit affirmed petitioners' convictions.

ii.

Introduction

This petition stems from the ABSCAM "sting operation" perpetrated upon petitioners by the Federal Bureau of Investigation. The Factual Background set forth herein incorporates events relevant to this action as these events were developed at both trial and the subsequent due process hearing. The basic issue to be determined by this Court is whether the ABSCAM investigatory methodology reached the "demonstrable level of outrageousness" requisite

to a finding that it violated due process. **Hampton v. United States, 425 U.S. 484, 495 n.7 (1976).** What has been said thus far respecting the magnitude and significance of the due process issue is not intended to obscure the examination of other claims herein relating exclusively to the primary right at issue in every appeal from a criminal conviction, viz. the general right to a trial free of serious error and unfairness.

The due process concerns impact upon two areas. The violations relate to disregard of safeguards designed to ensure that law enforcement methodology does not rise to a level of outrageousness which is more deleterious to the public good than the crimes sought to be prevented and to making certain that all investigations are supervised and documented in a fashion which facilitates cogent judicial scrutiny. With regard to documentation and supervision, failings in this area acted in this case to preclude any reliable determination by a jury of the nature of interaction between law enforcement operatives and the unwitting petitioners. The violations which we allege must

be remedied by provision of relief to petitioners and articulation of reasonable guidelines to be applied in judicial review of future investigations.

iii.

ABSCAM - Its Genesis, Growth And Development

a. Introduction

The ABSCAM operation commenced in January of 1978. (PDP3.185-1 to 5). A front operation was used by the FBI to establish the charade of the existence of a rich Arab Sheik who was willing to finance various projects. (T17-1-4 to 8). The fictitious sheik was represented as having money to invest in projects proposed by persons who could deliver to him politicians who would become his friends. (NYDP Ex.58). The representatives of the Sheik, who were in reality undercover FBI agents and a paid informant (Melvin Weinberg), would then prepare the politican to accept money before the video-tape cameras. In connection with this plan, the ABSCAM operatives were instructed to turn away individuals who proposed wholly legitimate ventures. (T1714; T1715). Moreover, assuming that an illegitimate proposition was made, the ABSCAM operatives

were instructed to limit any inducements to amounts which would comport with sums likely to be offered in the real world.

Approaches were initiated by Weinberg to various individuals whom he perceived to have the abilty to lure public officials. Weinberg began this process by violating the first instruction, viz. to refrain from attempts to corrupt persons who proposed legitimate deals. (NYDP 4281 to 4283). He also continually offered inducments which are not likely to occur within a real world situation, offering as much as $42,000,000 to William Rosenberg for his participation in doctoring stolen or forged securities. (NYDP4284 to 4287). That offer was in addition to an offer to finance a legitimate project. (NYDEP4282-3 to 5). Weinberg also asked Rosenberg for $15,000. This act was the beginning of Weinberg's double dealing and attempts to make side money. (NYDP 4388-24).

In December of 1978, Weinberg met Errichetti. Weinberg's introduction to Errichetti sparked the phase of ABSCAM which gave rise to the instant prosecution. None of the individuals herein were believed to be corrupt prior to the approach to them by the ABSCAM operatives. In

short, the "sting operation" designed to ensnare persons such as petitioner Myers was not premised on probable cause or any form of suspicion of past corruption. The investigation was premised upon determining whether promises of investments in the public officials' home districts and payments in amounts ranging between $50,000 and $100,000 would be sufficient to prompt the politicians to promise to perform official acts in an influenced manner. Weinberg's role was to fashion a meeting at which the politician would be prepared to state before the cameras that he would perform official acts in return for the money. (T.1066-1067).

b. The Manner Of Recruitment Of Melvin Weinberg And His Conduct

Weinberg's involvement in ABSCAM stemmed from a conviction in Federal Court in 1977. (T1587-15 to 20). Weinberg was convicted of mail fraud, wire fraud and conspiracy. (T1587-24; T1687-18 to 22). His sentence for the offenses, viz. a three year jail term, was modified to probation because of his agreement to work for the FBI as a paid informant. (T1588-18 to 21).[2] The deal was that

---

[2] Weinberg defrauded various individuals of

Weinberg would "get four cases" for the government in return for probation. (T1690-2 to 3). Thereafter, in 1978 he became a paid informant on an ongoing basis. Weinberg received a monthly salary from the FBI for his efforts.

Weinberg's activities as a paid informant in 1978 were a continuation of cooperation which he provided to the FBI in the 1960's. (PDP3.65-1 to 10). Weinberg worked for the FBI during the period of time in which he was operating the fraudulent schemes which ultimately led to his apprehension and conviction. (PDP3.67-17 to 24). Weinberg lied to the FBI about his personal activities. (PDP3.70-17 to 19). Consistent with his past, Weinberg engaged in double dealings, i.e. attempts to generate personal gain, while he was being paid by the government to make cases in ABSCAM. This double dealing included solicitation of money and gifts which were not reported to his superiors.

In addition to having a private plane, yacht, office and luxurious townhouse at his disposal, Weinberg was paid $133,000 (T2020-2 to 20; T2023-13). Weinberg is at this

---

$200,000. As part of his arrangement with the government, he was not required to pay any restitution to the victims. (T1687-10 to 13).

point in time receiving $3,000 per month as a paid informant and thus his compensation for ABSCAM is approaching $200,000. Weinberg expects to receive a substantial bonus subsequent to completion of his testimony and other participation in the trials. (T1853). Interestingly, Weinberg has not filed tax returns for the years 1977, 1978 and 1979. (T1802-2 to 23). Weinberg received a $15,000 reward for one transaction. (D.P.Ex. 59). That reward was discussed with the prosecutor (Puccio) and clearly stimulated Weinberg toward zealous procurement of other public officials. A book publisher has also promised Weinberg a $100,000 advance for a book on his role in ABSCAM. (T1972-6 to 13). He has already received $15,000. Weinberg also expects to reap profits from a film contract. (T1972-2 to 14).

To facilitate the making of cases, Weinberg selectively recorded conversations. It was not until April 1979, five months after he met Errichetti, that Weinberg was even instructed to record all conversations. (Jenrette Tr.). He also erased portions of recordings and distorted the contents. (T1638-7 to 11; T1956-22 to 25; NYDP916 T10422; NYDP Ex.79). Indeed, in one circumstance, it was necessary

for Weinberg to destroy certain tapes. He claimed at trial that the tapes were stolen. (T1839-22 to 25). Although the tapes were allegedly made within a week of their disapperance, Weinberg could not remember the names of the subjects recorded or the topics of the conversations. (T1840-3 to 9).

We iterate that Weinberg was paid "to make cases." (T1690-2 to 3). In June of 1979, a tape was made of a prep session at which Weinberg prepared Senator Williams to perform for the camera. The tape was scrutinizd by Weinberg's superiors and he was admonished not to lead politicians into incriminatory activity. (NYDP350-1). Thereafter, he was severely criticized on August 9, 1979, for this form of coaching by Edward Plaza and Robert Weir, Assistant United States Attorneys from the Newark office. (NYDP1206-12). Significantly, from that point forward, no tapes were made of prepatory sessions relating to the public officials. Moreover, Weinberg at no time thereafter participated in any such session with a politician. He recruited Errichetti and later Criden to perform this function.

iv.

Factual Background

a. The Initial Transaction In Myers

In July of 1979, defendant Criden was approached by two individuals, Messrs. Niefeld and Berman, regarding development of a parcel of real property in Atlantic City. These individuals were seeking assistance in securing financing for a casino-hotel to be constructed on the property. (PDPl.5-1 to 5). Criden was given authorization to seek financing and a potential buyer for the completed casino-hotel. (PDPl.5-6 to 10). Criden informed petitioner Johanson, his law partner, of the arrangement. (PDPl.5-11 to 12). Thereafter, Johanson discussed the project with an individual named Meiler. (PDPl.5-14 to 15). Meiler suggested that his neighbor, petitioner Errichetti, might be of assistance. (PDPl.5-16 to 21; PDP2.5-14 to 18). Arrangements were made to present feasibility studies to Errichetti. To this end, a meeting was convened at Meiler's home. (PDPl.6-1 to 3; PDP2.5-20 to 22). The meeting was attended by Johanson, Errichetti and Meiler. (PDP2.5-20 to 22).

Errichetti reviewed the materials and agreed to seek financing. In return, he was offered an interest in the project. Errichetti then placed a telephone call to Weinberg. Johanson spoke to Weinberg. (PDP2.5-23 to 25). Weinberg stated that he represented a wealthy Arab Sheik and would discuss provision of financing for the project. (PDP1.6-13 to 18). A meeting was arranged for July 26, 1979, in Fort Lauderdale, Florida. Prior thereto, Johanson verified Weinberg's representation that the sheik had $400,000,000 on deposit at the Chase Manhattan Bank in New York. (PDP2.7-10 to 20).

On the evening of July 25, 1979 Meiler, Errichetti, Johanson and Criden booked passage on a commercial airline flight to Fort Lauderdale. (PDP1.6-19 to 22). Criden and Errichetti were introduced to one another for the first time on the plane. (PDP1.127-14 to 19). Anthony Amoroso, an FBI agent posing as Anthony DiVito, and Weinberg met the group at the airport. (PDP1.6-23 to 25). The following day, a meeting was convened aboard a yacht utilized by Amoroso and Weinberg as part of the "sting operation." (PDP1.7-9 to 11).

Johanson and Criden made a presentation to Amoroso and Weinberg concerning financing of the wholly legitimate casino-hotel project. (PDPl.7-20 to 22; T579-l4 to l9). Amoroso and Weinberg indicated that the sheik would be interested in this project. (T923-lo to l3). Weinberg stated that he expected to secure the approval of the sheik within 30 to 60 days. (PDPl.8-3 to l2). The potential gain to Criden and Johanson would have been "anywhere from $3,500,000 to $5,000,000".(PDPl.9-8 to 9). A second conversation ensued on the upper deck among Weinberg, Errichetti, Amoroso and Criden. (Tr.581-6 to 10). Amoroso stated to Errichetti that the Sheik was concerned about obtaining asylum in the United States because he anticipated that he might shortly be forced to emigrate. (T58l-l6 to 20).

On the return flight to Philadelphia, Errichetti stated to Criden that his association with the Sheik's representatives was "like a fantasy, a fairy tale." (PDP1.9-12 to 15). He indicated that the Sheik would pay "substantial fees" to meet public officials with titles. (PDP1.9-17 to 21; PDP-1.10-1 to 5). Errichetti stated that

the Sheik merely wanted to be associated with public officials and there were "no strings attached." (PDP1.117-14 to 15).

Criden discussed the matter of introductions to politicans with his law partners, including Johanson. (PDP1.11-16 to 19). Johanson occupied a seat on the Philadelphia City Council and had significant political assocations. (PDP1.11-17 to 19). Criden requested that Ellis Cook, a member of the law firm research the propriety of such introductions. Cook concluded that such introductions were wholly proper. (PDP1.12-6 to 10).[3]

Johanson contacted petitioner Myers. (T2708-4 to 13). Johanson described to Myers the "rich Arab Sheik" and the casino-hotel project which was presented to the Sheik's representatives. (T2709-16 to 19). Johanson then expressed to Myers the offer conveyed to him by Criden that the Sheik would pay $100,000 in return for introductions to important persons. Johanson unequivocally stated to Myers that there

---

3 Cook, an unindicted co-conspirator, testified at trial under a grant of immunity. Cook stated on the government's case-in-chief that it was the understanding of the group that there was no quid pro quo.

would not be any quid pro quo. (T2709-12 to 16). Johanson iterated that Myers would not be required to do anything in return for the money. (T2712-1 to 16).

Johanson informed Criden that Myers was willing to meet with the sheik. Prior to the day of the meeting, Errichetti was told by Weinberg that he (Weinberg) would meet with Myers to prepare him for his conference with the Sheik. (PDpl.119-19 to 25). Weinberg altered these plans and informed Errichetti that he should coach Myers. (PDPl.120-14 to 18). Errichetti pulled Myers aside and provided him with the prepatory speech given to Errichetti by Weinberg. (PDPl.120-14 to 18). Errichetti emphasized, as he believed was his understanding with Weinberg, that any representations by Myers "would all be falsehoods." (PDPl.120-14 to 18).

Thereafter, Errichetti informed Myers that the sheik would not attend the meeting and one of his representatives would substitute. Myers expressed concern because he was previously told that he could talk about any topic since the sheik did not understand the English language. Errichetti retorted:

> Tell them to do anything they want, don't worry about that. You don't ever have to worry about the Sheik coming to America because Mel already told me if he has to leave his country arrangements have been made in South America and they never intend to come to America. (T2718-20 to 25). Cf. (PDP1.121-17 to 25).

The meeting convened and Myers performed in a manner consistent with his instructions. (T2721-5 to 2739-17). When the meeting concluded, Myers was handed an envelope by Amoroso containing $50,000. (T2739-18 to 21). After he departed from the room, Myers gave the envelope to Errichetti. (T2739-18 to 25). Myers never saw nor spoke to Errichetti again in connection with this or any ABSCAM transaction. (T2740-2).

b. The Second Transaction In Myers

On January 24, 1980 Myers received a telephone call from Criden. Myers was invited by Criden to meet with a "new" representative of the Sheik, Mr. Cohen. Myers was told that Cohen was interested in investing money in

Philadelphia. (T2744-1 to 3). A meeting was convened at the Barclay Hotel. Mr. Cohen was in fact Michael Wald, an FBI agent. (T2747-12 to 15). Myers was of the view that the same ground rules applied as were applicable at the prior meeting, namely that he "had to impress them that [he] was a strong guy the same way [he] did back in the August meeting." (T2747-22 to 25).

The meeting was attended by Myers, Wald and Haridoplos, who was also an FBI agent. Myers, during the meeting, told Wald and Haridopolos that on the previous occasion in which he met with the Sheik's representatives, he did not receive the amount of money he anticipated. (T2779-8 to 12). Myers returned to the Barclay Hotel the following evening subsequent to a call from Wald. (T2795-16 to 17). Myers at the meeting, consistent with his understanding that he was play-acting, indicated to Wald and Haridopolos that "he could handle any problem that could ever exist." (T2718-23 to 25).

Petitioners were convicted of each of the counts in the indictment. The Second Circuit affirmed the convictions. This petition follows.

II.

The Jurisprudential Significance Of The Arguments To Be Raised Before The Court

Petitioners Myers, Errichetti and Johanson have selected three issues to be raised before this Court. The issues relate to: (1) recognition and application by this Court of the so-called due process defense to conviction; (2) the nature and scope of Congressman Myers' immunity under the Speech and Debate Clause; and (3) the admissibility of subsequent criminal acts into evidence as proof of intent on an earlier occasion. The national and juridical importance of these issues cannot be gainsaid. These issues arise within the context of a challenge to an unprecedented expenditure of Executive Branch resources to determine the corruptibility of Congressmen who had not previously demonstrated any moral frailty or breach of fiduciary duty. These claims are outlined below and detailed at length in the reasons for granting the writ.

a. The Due Process Violation

This Court must issue a statement respecting the existence or non-existence of the "due process defense" to conviction. And, in the event that this Court firmly endorses the vitality of such a defense, a definition as to its nature and scope must be set forth. Presently, the precedential basis for the defense in the federal system lies within the concurring opinion of Justice Powell in Hampton v. United States, 425 U.S. 484, 495 (1975). In Hampton Justice Powell expressed the view that "[p]olice over-involvement in crime [could] reach a demonstrable level of outrageousness [sufficient] to bar conviction." Id. at 495 n.7. We believe that the Constitution mandates recognition of the defense since it is the exclusive means to remedy unsavory and outrageous law enforcement methodology.

In denying petitioners relief on due process grounds, the Second Circuit rejected the defense. The Court stated:

> In assessing this collection of claims, we acknowledge intimations in decisions of the Supreme Court that the due process requirement of fundamental fairness may have a special pertinence when Government creates

> opportunities for criminal conduct...At the same time, we recognize that, with the exception of a decision by a divided panel of the Third Circuit, United States v. Twigg, 588 F.2d 373 (3 Cir. 1978), convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement...United States v. Myers, 692 F.2d 823, 837 (2 Cir. 1982).

The Second Circuit further noted that in Archer v. Commissioner of Corrections, 646 F.2d 44, 47 (2 Cir. 1981), cert. den. 454 U.S. 851 (1981), it rejected "the due process claim" and this Court denied certiorari. Consistent with the importance of this case and the ambiguous precedential value of a denial of certiorari, the court chose to analyze the facts of the instant matter and issue a finding with respect to whether a due process violation inhered. Despite evidence clearly establishing government over-reaching and creation of crime, the court stated "[w]hatever may be the due process limit of governmental participation in crime, it was not reached here." 692 F.2d supra at 837.

Contrary to the decision of the Second Circuit herein, the majority of State courts addressing this issue within the last several years have recognized that there is no value to society in prosecutions that result from government conduct which is as outrageous as that engaged in by the subject of the investigation.[4] The highest value to society, with respect to the administration of criminal justice, is in ensuring that the techniques employed by law enforcement are fair and rational and bear a reasonable relationship to the evil sought to be uprooted. Where government resorts to conduct more offensive than that of the criminal element, the greatest need for deterrence relates to prevention of a recurrence of the government's

---

4 See New Jersey v. Molnar, 81 N.J. 475, 484 (1980); Norman v. Texas, 588 S.W.2d 340, 346 (Ct. App. 1973); Pennsylvania v. Jones, 363 A.2d 1281, 1284 (Super. Ct. 1976); Michigan v. Wisneski, 292 N.W.2d 196, 198 (Ct. App. 1980); North Dakota v. Berger, 285 N.W.2d 533, 539 (Sup. Ct. 1979); Ohio v. Metcalf, 396 N.E.2d 786, 791 (Ct.App. 1977); Minnesota v. Ford, 276 N.W.2d 178, 182 (Sup. Ct. 1979); Bruce v. Alaska, 612 P.2d 1012, 1014 (Sup. Ct. 1980); Utah v. Taylor, 599 P.2d 496, 503 (Sup. Ct. 1979); California v. McIntire, 591 P.2d 527, 528 (Sup. Ct. 1979).

acts as opposed to mere apprehension of the criminal. ABSCAM was such an example of outrageous and unacceptable law enforcement.

The so-called due process form of the entrapment defense objectively focuses upon investigatory tactics and the affect that these tactics might have on an unwary innocent person. Stated somewhat differently, the objective entrapment defense does not scrutinize the predisposition to commit crime or lack thereof of the defendant. The defense is focused upon the interest in structuring investigations which do not have the capacity to bring about unreliable and undesirable results.

This Court is compelled by the Constitution to identify the defense and determine whether its application to this case renders the convictions a nullity. This Court is the ultimate arbiter of disputes respecting the substance of the Bill of Rights. If the due process defense exists within our federal Constitution, it exists for all whether the situs of a prosecution is in a state or federal court. As importantly, it shields all citizens from improper governmental conduct without respect to the particular status of a given citizen.

b. Congressman Myers' Immunity Based On The Speech Or Debate Clause And The Separation Of Powers Doctrine

In United States v. Myers, 635 F.2d 932 (2 Cir. 1980) (hereinafter Myers I), a panel of the Second Circuit considered the Speech or Debate clause and Separation of Powers doctrine issues implicit in the ABSCAM prosecution insofar as it reached Members of Congress. The Myers I Court received the issue as part of a pretrial appeal of denial of a motion to dismiss the indictment. The Court heard argument and considered substantial briefs. The panel's opinion disposed of those issues unfavorably for petitioner Myers. Those same issues were raised as part of the post-conviction appeal of Congressman Myers. It was hoped that the arguments would persuade the Court to reexamine its conclusions in Myers I, supra, and vindicate the critical constitutional interests implicated by this unprecedented prosecution.

However, in its second opinion below (hereinafter Myers II), the court iterated its view that "members of Congress enjoy no special constitutional rule that requires prior suspicion of criminal activity before they may

be confronted with a governmentally created opportunity to commit crime." 692 F.2d supra at 835. It is submitted that this Court must elucidate the nature of the Speech or Debate Clause and the Separation of Powers doctrine in a fashion which corrects the perception of the Myers I and Myers II courts. These provisions of the Constitution must be upheld as an effective shield against the form of arrogant intimidation of Congress by the Executive demonstrated within ABSCAM.

The investigation of one branch of our tri-partite government by another, referred to aptly by the Myers I Court as a "maneuver", implicates the core values of our constitutional scheme. The framers of the Constitution labored hard to erect a system of checks and balances to protect each branch from encroachment by the others. See Federalist No. 48 (Cooke Ed.). The Speech or Debate clause was insisted upon as one such form of security. The clause was drawn from the English Parliamentary Privilege won by the Parliament in the English Bill of Rights of 1689. The English Parliamentary Privilege capped the struggle of the Commons over successive monarchs who "utilized the criminal and civil law

to suppress and intimidate critical legislators." United States v. Johnson, 383 U.S. 177, 178 (1966). Lifetime tenure for federal judges (with salary protection) and the concept of "Executive Privilege" are illustrations of "practical security" imbedded in our system for the protection of the other two branches.

Although this Court has not interpreted the Speech or Debate clause to insulate Members of Congress from bribery prosecutions, it has generously construed the clause to prevent any use whatever of past legislative acts or the motivations therefor. See, United States v. Helstoski, 442 U.S. 477 (1979). It is abundantly clear in the instant case that the indictment was returned by a grand jury which depended heavily upon protected material furnished it under its subpoena power. Petitioner Myers asserts again that the indictment itself violated his rights under the Speech or Debate clause. See United States v. Helstoski, Crim. No. 76-201 (D.N.J. Feb 27, 1980) (unpublished) (Dismissing the Helstoski Indictment on remand on this ground).

As one of the checks and balances of our constitutional system, the Speech or Debate clause cannot be left as shallow as it has been demonstrated to be in the trials of the ABSCAM Members of Congress. To breath some life into the clause, this Court must develop a corrollary principal of constitutional law. In this petition, we specifically request that this Court find as an aspect of Separation of Powers some requirement of probable cause or reasonable suspicion to be prerequisite to the application of an undercover sting operation directed by the Executive branch against members of the Legislative or Judicial branches. This would draw a reasonable compromise between the English rule of absolute privilege from criminal prosecution and this Court's present position that members of the Congress not be absolutely immune from prosecution for bribery.

c. Admission Of Subsequent Acts As Proof Of Intent On A Prior Occasion

At trial, the court instructed the jury that the conspiracy charged in the indictment was limited to "[conduct] relating to Congressman Myers and the immigration, residency and citizenship status of the

[fictitious] sheik." (T4060). The alleged object of the conspiracy was to involve Myers in bribery or acceptance of a gratuity. The trial court specifically stated that petitioners were not charged with a conspiracy which encompassed "any other Congressmen; any Senators; any hotel projects or zoning problems in Philadelphia; any gambling casino projects in Atlantic City; any port develoment projects in Philadelphia, any dealings with organized crime, unions, or local or state officials, or any other matters." (T4060). On the basis of the analysis adopted by the court, the conspiracy charged in the indictment terminated on August 22, 1979, immediately after the meeting at JFK Airport and division of the $50,000 received by petitioner Myers in connection therewith. No other proof of concerted conduct involving Myers, Errichetti, Johanson and Criden subsequent to that date was adduced at trial.

The court's instruction to the jury setting forth the parameters of the conspiracy was prompted by admission into evidence of acts of petitioner Myers and Criden which occurred subsequent to August 22, 1979. The court admitted evidence that Criden and petitioner Myers met with new representatives of the Sheik five months

after termination of the conspiracy. Those meetings incorporated the extraneous and inflammatory matters which the court was compelled to inform the jury were outside the conspiracy charged in the indictment. Those extrinsic acts were proffered by the government as proof of petitioner Myers' and Criden's criminal intent respecting the earlier transaction. (TG4061). Since the conspiracy was terminated, these acts were concededly not in furtherance of it nor bore any relationship to it. Those acts also bore no relationship to the substantive bribery count.

Admission of the subsequent acts as proof of petitioner Myers' intent respecting the conspiracy and bribery counts charged in the indictment was clearly erroneous and in the context of this case denied petitioners a fair trial. The evidence merely tended to demonstrate a propensity to commit crime, which prejudiced each defendant at trial. In its opinion below, to avoid any ruling respecting the admissibility of subsequent acts as proof of intent on an earlier occasion, the Second Circuit disagreed with the trial court as to the date when the conspiracy terminated. In that fashion the Court sidestepped an issue of great jurisprudential significance in the context of

appropriate circumscription of use of "other crimes" evidence. Subsequent acts are not probative of intent on a prior occasion. This Court must issue an opinion respecting the clear jeopardy to a defendant's rights which such evidence poses when admitted into a criminal trial.

Reasons For Granting The Writ

Point I

CERTIORARI SHOULD BE GRANTED TO PERMIT THIS COURT TO DETERMINE WHETHER A DUE PROCESS DEFENSE EXISTS WITHIN OUR CONSTITUTION. IF SUCH A DEFENSE IS FOUND TO EXIST THIS COURT MUST SCRUTINIZE THE TACTICS UTILIZED BY THE GOVERNMENT AND STATE WHETHER THE OVER-REACHING AND CREATION OF CRIME WHICH EARMARKED THE ABSCAM INVESTIGATJION VIOLATED PETITIONERS' RIGHTS REQUIRING DISMISSAL OF THE INDICTMENT OR IN THE ALTERNATIVE SUPPRESSION OF ALL EVIDENCE DERIVED FROM ILLEGAL TACTICS.

The Second Circuit erred in ruling that the ABSCAM investigation was not so outrageous as to violate the petitioners' due process rights. Preliminarily, we emphasize that it is our view that a due process defense is mandated by the Constitution. And, recognition of the defense requires reversal of petitioners' convictions. We predicate our claim as to a due process violation on two combined bases. The first basis of our claim relates to the generally outrageous and unconscionable nature of the investigation which had the effect of creating as opposed to ferreting out crime. The second basis of the claim is that purposeful defects in the government's investigatory methodology were such that it placed petitioners in the posture of being unable to adequately defend against the charges at trial. This result stems from manufacture by the government of inculpatory evidence in conjunction with purposeful suppression of indicia of innocence central to a fair assessment of the events by a trial jury. And, even assuming that indicia of innocence was negligently as opposed to purposefully suppressed, the injury and necessity for remedy are no less compelling. The tactics from which

this combined claim stem are: (1) the targeting of the legislative branch without probable cause; (2) offers of inducements in surrealistic amounts; (3) erasure and destruction of tapes; (4) selective recording of conversations; (5) inadequate documentation of events by FBI personel; (6) specific failures respecting recording conversations involving Weinberg and middlemen (petitioner Errichetti and Criden); (7) the general failure to supervise Weinberg; (8) permitting Weinberg to engage in double dealing; (9) offering Weinberg huge sums of compensation, including bonuses, for making cases and testifying at trial; and (10) use of a personage such as Weinberg at all to "sting" a United States Congressman.

We submit that this Court must issue a clear statement which will preclude a future investigation which has as its parameters only the imagination of particular governmental operatives and paid informants.

i.

The Due Process Focus

The interest of preventing the manufacture or instigation of crime must be susceptible to vindication by virtue of a challenge to the jury's verdict and the indictment itself under the broad protections of due process. There are recognized boundaries to investigatory tactics in a free society that is committed to protecting the rights of all of its citizens from overreaching and abusive prosecution of criminal causes.5

The due process test is more difficult to apply than the subjective test of entrapment (which focuses upon the predisposition of the defendant) but at the same time is even more vital to a free society since it acts essentially as a limitation on the police power of the state. The liberty vs. security balance inherent in the due process test is one that American courts must draw in a host of other

---

5 It is now well-recognized that only a three justice plurality suggested otherwise in **Hampton**; two justices concurring said they would recognize a due process defense independent of entrapment in an appropriate case and three justices said they would have applied such a defnese to **Hampton** itself. Justices Stevens and O'Connor have not expressed their views on the matter so that at least five and possibly seven justices have stated that a due process defense of the kind outlined herein is valid at least for the federal courts.

criminal law issues. It is one which we are reminded in each setting depends upon the "totality of the circumstances." The interest in this case is in determining the balance where the object is a criminality test aimed at Congress. In this context, we emphasize that there was no report of imminent danger being acted upon by the ABSCAM investigatory crew nor any suspicion of widespread corruption in the Congress requiring drastic law enforcement efforts.

Under the fundamental fairness and totality of the circumstances approach, the ABSCAM investigation exceeded the police power of the federal government. In general, the central due process violation is the same concern that lies at the core of the entrapment defense itself: the investigation in the instant matter did not uncover criminal conduct. Unmistakably, the subject matter of this indictment was the product of instigation by the government. It is manifestly not the province of law enforcement to create or instigate criminality. And, that is the heart of the first due process violation.

A second evil arising in this case is that the overriding goal of securing convictions resulted in an infirm investigatory methodology. The method of investigation employed in this case, in terms of collection of evidence, has made it impossible to reliably determine guilt in a criminal trial. The manner of the investigation, particularly selectively recording conversations and failure to record others, irretrievably renders unreliable any outcome and dismissal with prejudice is the only practical remedy.

ii

The Analysis Undertaken By The Second Circuit

The Second Circuit affirmed in toto the activities of law enforcement officials within the context of the ABSCAM investigation. The Court considered and denied petitioners' claims of relief on the basis of evidence of governmental creation of crimes; excessive inducements and coaching of congressmen.

a. Creation Of Crimes

With respect to the claim of creation of crimes, the Myers II Court found that the level of governmental involvement did not reach the "due process

limit of governmental participation in crime." 692 F.2d supra at 837. In the view of the Myers II Court, the ABSCAM sting operation "was the creation of an opportunity for the commission of crime by those willing to do so." 692 F.2d supra at 837. Contrary to the facts as adduced at the due process hearing, the Court characterized "the essential conduct of the agents and their paid informant [as] to see who showed up to take bribes and videotape them during so." 692 F.2d supra at 837.

b. Size Of Inducements

The Second Circuit made no cogent statement with respect to the issue as to the size of the inducments offered to Congressman Myers and petitioners Errichetti and Johanson. With respect to the Congressmen involved, the Myers II Court merely stated that the congressmen did not appear to be reluctant in the acceptance of money as a precondition to the sheik's decision to invest millions of dollars in projects within their districts. 692 F.2d supra at 838. With regard to the non-Congressmen petitioners, the Court did not utter any opinion as to propriety of inducments in multi-million dollar amounts. 692 F.2d supra at

837-838. In short, the Myers II Court did not provide any sound analytical opinion with respect to the size of inducements.

c. Coaching

The coaching issue was obscured by the Second Circuit in a statement that petitioners "seek to create a due process violation by combining an erroneous interpretation of the bribery statute with an unrealistic assessment of the facts." 692 F.2d supra at 840. As part of this analysis, the Second Circuit stated that the "playacting" defense, employed at trial with the acquiescence of the trial court, is not a defense to bribery. 692 F.2d supra at 840.[6] The Myers II Court then stated that the coaching "claim would only have merit if there were insufficient evidence of defendants' predisposition to playact or if the agents' conduct were so extreme as to exceed due process limits." 692 F.2d supra at 842. With regard to the due

---

6 Whether or not playacting is a defense to bribery is not an issue herein. Assuming that playacting is not a defense the coaching aspect of the investigatory methodology becomes proof that the agents prodded the Congressmen into crimes by convincing them that the conduct was lawful.

process implications, the Court was speaking of the subjective test of entrapment as opposed to the so-called due process defense. In this context, the court stated that "promp t acquiescence shows a predisposition to accept a bribe, whether or not a promise of official action is intended to be kept." 692 F.2d supra at 842. With regard to any implication of the objective due process defense, the Court stated that the "bare suggestion to a Congressman that he take a bribe, even for a promise he need only pretend to make, surely does not violate a constitutional standard of outrageous behavior." 692 F.2d supra at 843.

d. Impairment of Accurate Fact-finding

In assessing the claim of impairment of accurate fact-finding, the court commenced its analysis with mention of a "well-established reluctance to dismiss criminal prosecutions because of faulty Government investigation." 692 F.2d supra at 843. Recognizing that petitioner urged efforts "to frame standards for undercover investigations," the Myers II Court nonetheless simplified its task by stating "[w]herever the [due process limits of fundamental fairness] might be, they have not been crossed in these

cases." 692 F.2d supra at 843. With specific respect to the employment and utilization of Weinberg the Court stated the "Due Process Clause does not forbid [his] employment, detail [his] supervision, nor specify [his] compensation." 692 F.2d supra at 846. The Myers II, in essence, was willing to tolerate without qualification future investigations of this type.

iii.

The Thrust Of ABSCAM Was The Manufacture Of Criminal Offenses

The Myers II Court was constrained to recognize that to be legitimate an undercover operation must be geared to identification of criminality as opposed to creation or manufacture of crime. This principle is purportedly recognized by the government. This distinction between improper instigation of crime and legitimate identification of criminal activity is the thrust of the first prong of defendants' due process claim. That ABSCAM had the earmarks of manufacture of crime was recognized and consistently emphasized by the prosecutors in the District of New Jersey. See United States v. Myers, 527 F.Supp. 1206 (E.D.N.Y. 1981).

A proper focus may have been assumed when the FBI initially decided to employ Melvin Weinberg but did not last very long as ABSCAM unfolded. With no predicate basis of probable cause or need, it was transformed into an elaborate, costly and sophisticated undercover "sting" operation designed to ensnare public officials who for a price would agree to do or pretend to do things which were illegal. The goal was to have the politicians accept money on camera with the promise that they would aid an imaginary sheik in an immigration problem.

Although courts have not yet specifically limited the approach of undercover agents to targets whom they have probable cause to believe are engaged in illegal activity, United States v. Catanzaro, 407 F.2d 998 (3rd Cir. 1969), some minimal level of suspicion should be a pre-requisite to the approach. See Tzimopaulous v. United States, 554 F.2d 1216, 1217-1218 (1 Cir. 1977). Otherwise, the operatives may find a level of susceptibility among a fairly large section of the community, and the police function, if given this full license, will tend to promote rather than prevent crime. See United States v. Bocra, 623 F.2d 281, 288-289 (3 Cir. 1980).

Numerous cases in the state and federal courts have now embraced either the objective theory of entrapment or the overreaching and overinvolvement due process defense. The leading case, decided in the Third Circuit is United States v. Twigg, supra. Twigg has retained its vitality despite the opinion of the Third Circuit in United States v. Jannotti, 673 F.2d 578 (3 Cir. 1982), an ABSCAM-related case in which the due process defense did not lead to reversal of the convictions. . The Jannotti Court nonetheless specifically upheld its recognition of the due process defense in Twigg. The Jannotti Court merely stated that the facts before it did not rise to the demonstrable level of outrageousness which it reviewed in Twigg. The Jannotti Court was also careful to note that its findings as to the lack of a due process violation in the case before it did not bear any relationship to whether the police conduct in ABSCAM may have violated the rights of other defendants. Simply put, the Jannotti court might well have found a due process violation in Myers.

In Twigg, a government informant, seeking to make cases, contacted an acquaintance of 20 years to discuss development of an amphetamine laboraory. The

target expressed interest and with the copious assistance of the informant and the DEA an operation was constructed. The operation did not previously exist and there was no reason to believe that it would have come into existence absent the active intervention of the government's informant and the government's provision of resources. Moreover, the informant's initial target recruited another individual, Twigg, to assist in the operation. Although the informant did not specifically generate this result, it occurred with the full knowledge of the informant's contacts at the DEA. Entrapment was tried to the jury by the informant's initial target but not by Twigg since Twigg was not brought into the operation by the government's agent. The jury found pre-disposition and convicted. The Third Circuit reversed in an exhaustive decision.

After reviewing this Court's decisions in Hampton and Russell, and a variety of circuit court decisions before and since, the majority held that a due process defense of over-reaching and overinvolvement was not barred by Hampton and Russell and indeed that a majority of the Supreme Court would clearly embrace such a defense in the appropriate case. The majority further found that the

absence of an on-going criminal activity which ws infiltrated and exposed condemned the prosecution. The majority found that "the conduct of the government agents...generated new crimes merely for the sake of pressing criminal charges." Twigg Id. at 381. Likewise, in the instant case there was no suggestion that Congressman Myers was engaged in any covert operation of accepting bribes nor, as was conceded by the district court, is there any suggestion that he was ever involved in anything criminal in the past.

The dissent in Twigg was of the view that the majority had improperly used the due process analysis to reestablish the objective approach to entrapment after its rejection by a majority in Hampton. It should be emphasized though that the dissent did not disagree with the majority's condemnation of the overreaching. Rather, the dissent assumed the position that the federal courts after Hampton lacked authority to create a police-conduct defense under the banner of due process for a pre-disposed individual. But the majority correctly met that argument by noting that

both Russell and Hampton involved infiltration into on-going criminal operations. See United States v. Briola, 660 F.2d 763, 764 (lo Cir. l98l).

And, to make the analogy between Twigg and the instant case complete, it must be noted that in Twigg the defendant brought in by the codefendant and not by the government's information was also immunized by due process from a valid conviction since the misconduct in creating the offense was so "demonstrably outrageous" that it barred a valid prosecution. The court noted in Twigg that it was puzzled why the Government was extending such leniency to its informant in exchange for the convictions of two men with no apparent criminal designs. See id. at 381 n.9.

The basic difference between infiltration of existing ongoing criminal operations and generation of criminal conduct also underpinned the Court's decision in Greene v. United States, 454 F.2d 783 (9 Cir. l97l), wherein the governmental effort was rebuked. In Green, a federal agent instigated the defendants to reinvolve themselves in the production of bootleg liquor subsequent to their release from prison. The agent participated in construction of a

still and offered to supply equiment and an operator. The agent also provided sugar, a key ingredient, at wholesale prices and was the only customer of the operation. The Green Court reversed the conviction, finding that the agent had sought out and preyed upon the defendants immediately upon their release from prison. Cf. People v. Isacceson, 878 N.E.2d 78 (Ct. App. 1978); United States v. Brown, 635 F.2d 1207, 1212-1214 (6 Cir. 1981); United States v. Gonzalez, 539 F.2d 1238, 1239-1240 (9 Cir. 1976).

Examples of ABSCAM's overreaching and overinvolvement abound in the record. The government obviously manufactured a crime which otherwise was not likely to have occurred. The investigation focused indiscriminately on Congress. With specific regard to Myers, he was approached by respected attorneys who were induced by Weinberg to generate introductions to Congressmen. Johanson and Criden approached Weinberg with a wholly legitimate transaction. Weinberg and Amoroso dangled huge amounts of money before them in terms of financing of the project. Amoroso and Weinberg, however, made introductions to public officials a condition precedent for financing. This scenario was the creative activity of the government.

Bribes as instigated by Weinberg and Amoroso were wholly outside the scope of Criden's and Johanson's purposes in contacting them.

Weinberg, the government's chief operative, immediately involved himself in criminal conduct. He provided stolen and forged certificates of deposit to Rosenberg and solicited gifts. Weinberg not only feigned double-dealing on his employers, he actually engaged in it and in such a way as to provide Errichetti instant ascension to millionaire status. Further, he performed his agent responsibilities, viz. recordings of conversations and erasures, in such a fashion as to further enhance the creation of crime.

Exorbitant gain was offered to all of the Myers defendants. Myers was promised $50,000 for a feigned performance. Johanson and Criden were offered the opportunity to divide between $3,500,000 to $5,000,000. Errichetti was offered interests in a real estate company whose initial venture would yield $3,000,000 with a 9% interest in a $50,000,000 profit, a titanium mine, a

condominium, a position as the sheik's highly paid personal representative as well as interests in casino-hotels in Atlantic City and finders fees on loans and other deals.

It is clear that there was no responsible perception that the ABSCAM scenario would prevent further crime since there was no evidence that any criminal activity was afoot. A wholly legitimate deal was proferred by petitioners Criden and Johanson. The response was creation of a bribery scenario by Weinberg and Amoroso which was unrelated to the legitimate deal.

iv.

The Manner Of Supervision Of The ABSCAM Investigation And The Means Of Generating Evidence Was So Deficient That It Acted To Suppress Compilation Of Exculpatory Evidence And Rendered Defendants Unable To Fairly Defend In Violation Of Due Process

The manner of supervision of Weinberg, who was essentially without guidance in his efforts to generte evidence of criminality, was impermissibly deficient since it resulted in the creation of an offense in which petitioners' complicity may not be reliably determined. Tapes were erased and destroyed, conversations were selectively recorded and Weinberg was permitted to manipulate

middlemen by conducting meetings with them without the knowledge of the government. In his meetings and conversations with middlemen, Weinberg created the playacting rationale which instigated Myers to participate. However, since those meetings and conversations were not recorded, an unfair swearing contest has resulted. The net effect was that Weinberg structured a criminal case by preserving inculpatory evidence and suppressing exculpatory evidence.

Contrary to the Second Circuit's analysis of **United States v. Payner**, 447 U.S. 727 (1980), we submit that courts have retained supervisory power over the administration of criminal justice. **Payner** establishes the proposition that the nature of a violation of a third party's Fourth Amendment rights does not require a judicially-fashioned remedy respecting a claim for relief by an individual other than the party whose rights were violated. The **Jannotti** Court too recognized that the focus must be upon the rights of the individual seeking to assert a claim for remedy. Where an individual's own rights have

been violated a court not only has the authority to fashion a supervisory remedy but also a responsibility to do so. That responsibility is now upon this court.

POINT II

CERTIORARI SHOULD BE GRANTED TO FACILITATE A DETERMINATION BY THIS COURT AS TO WHETHER THE INDICTMENT AND PROSECUTION OF CONGRESSMAN MYERS VIOLATED HIS IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE. AND, THIS COURT MUST ALSO DETERMINE WHETHER THE CRIMINAL INVESTIGATION OF A MEMBER OF CONGRESS AS PART OF THE EXECUTIVE'S STING OPERATION WITHOUT A PROBABLE CAUSE BASIS VIOLATED THE SEPARATION OF POWERS DOCTRINES.

Creation by the Executive of the ABSCAM proceedings was a novel, unprecedented assault by one branch of government upon another. The Executive intentionally sought to invade the independence of the

Legislative Branch of government. The scheme devised by the Executive Branch and directed against members of the Legislative Branch was instituted without any basis to believe that Congress as a whole or any particular Congressman was soliciting or accepting bribes. Succinctly stated, it is conceded by all that the bribe offer made to petitioner Myers was not underpinned by a predicate finding that Myers was in any way predisposed to commit the crime of bribery.7 The factual predicate upon which the Government made its decision to attempt to solicit Myers and the other ABSCAM Congressmen were the representations of middlemen, most notably the Government's informant Mel Weinberg.

These facts completely distinguish the ABSCAM prosecution against Myers and related Congressmen from all previous executive branch prosecutions of Congressmen in that all such prior prosecutions involved either ongoing

---

7 It should also be noted that it is our view that playacting remains a viable defense to bribery. Thus, we hold the opinion that petitioner did not accept a bribe. The government, prior to offering the money and staging the performance convinced petitioner Myers that he would not commit a criminal act by accepting the money.

criminal activity involving a Congressman or a prosecution where the executive branch had valid probable cause to commence an investigation targeted against a specific Congressman. See Sorrells v. United Sttes, 287 U.S. 435, 441 (1932); United States v. Russell, 411 U.S. 423, 426 (1973). The government in this case manufactured a fictitious crime and lured otherwise honest congressmen into it.

The validity of the instant prosecution depends upon this Court's acceptance of the proposition that the executive branch can without probable cause entice Congressmen into a fictitious form of criminality. This precise danger was perceived by this Court in its opinion in United States v. Helstoski, 442 U.S. 477 (1979). In discussing the policy reasons behind the speech and debate clause, the Helstoski Court stated:

> [I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits...but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

> There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause...
>
> We reaffirmed that principle in Gravel v. United States...when we noted that the 'fundamental purpose' of the Clause was to free 'the legislator' from executive and judicial oversight that realistically threatens to control his conduct as a legislator.

If the executive branch through its politically appointed prosecutors is given the power and discretion to test selected Congressmen without sufficient probable cause, the potential for abuse is manifest. It was not so long ago in our country's history that great concern was expressed over an enemy's list utilized by the then Attorney

General of the United States at the instance of the President of the United States. The concern as expressed was the potential and actual abuse represented by such a list of persons who perforce became targets of investigation and/or prosecution.

Contrary to the suggestion of the Myers I Court the danger of a politically motivated prosecution is not overcome by the opportunity for a potential Congressional target to clear himself by saying no as such a conclusion does not express repugnance at the ill-founded investigation itself. It is the attempt to intimidate and not the conclusion of the bribe solicitation, be it successful or unsuccessful, which violates the separation of powers doctrine. At the very least, the prospect of an abusive executive investigation will inhibit Congressmen who are not predisposed to commit crimes or to corrupt their office in their conversations with third parties.

In Myers I the Second Circuit concluded that the essence of the argument made herein involves choices of public policy rather than constitutional imperatives. This Court has not limited the argument in that fashion. What is clear is that the issues raised herein are fundmental to the

structure of government. In United States v. Brewster, 408 U.S. 59 (1972), and United States v. Johnson, 383 U.S. 169 (1966), this Court expressed great concern and indeed division concerning the scope of the separation of powers doctrine. The issues raised herein are far from settled.

ABSCAM involves an executive branch prosecution technique which is unprecedented in the history of this county. The circuit court's opinion in the instant case and its companion cases represent a constitutional blank check to the executive branch to engage in future-like activity. It is appropriate that this court review ab initio the constitutional concerns raised herein so that all branches of government may understand their position vis-a-vis one another. Even if this court should conclude that the separation of powers doctrine were not violated by the instant prosecution tactics, such a declaration by this Court would obviate the confusion which will surround future interpretations of Myers I and Jannotti.

The solution does not lie in awaiting congressional response in the form of legislation or of future Justice Department regulations. Neither response would be of constitutional dimension. It is this Court which since

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), has reserved to itself the final word concerning the resolution of constitutional dilemmas. Accordingly, it is no answer to say that ABSCAM-type abuses may be corrected by non-judicial actions to the extent that such abuses impinge upon constitutional doctrine.

Acceptance of a rule of probable cause as a prerequisite for directing a sting operation against the Congress or the Judiciary would sacrifice very little in terms of protecting the public from corrupt legislators or judges. Where the Executive had reason to believe particular legislators or judges were engaged in corrupt activity it would be empowered to proceed with whatever law enforcement tools were appropriate. It simply could not without such a basis undertake to test randomly or otherwise members of the other branches to see whether they were corruptible. In petitioners' view this would be a desirable limitation on all sting operations. Tricks, deceit and guile as well as a highly paid informant were employed to test the Congress. If ABSCAM is to teach us anything about our institutions it would be preferable to conclude

that the checks and balances system needs some reinforcement rather than that one branch is steeped in potential for corruption.

POINT III

THIS COURT SHOULD GRANT CERTIORARI TO ISSUE A RULE AS TO THE ADMISSIBILITY INTO EVIDENCE OF PROOF OF CRIMINAL INTENT ACTS WHICH OCCUR SUBSEQUENT TO TERMINATION OF THE CONSPIRACY AND SUBSTANTIVE OFFENSES CHARGED IN THE INDICTMENT.

FedR.Evid.404(b) now governs the admission of evidence of other crimes, wrongs or acts in a federal criminal trial. The rule states inter alia:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as...intent...plan, knowledge...

The rule on its face would appear to clearly set forth the limited purposes for which "other crimes, wrongs or acts" evidence may be admitted. Courts, however, repeatedly over-extend the state of mind exception, finding that nearly any past criminal act or wrong is relevant to state of mind. Ordinarily, the sole grounds upon which such evidence is excluded is that the offense or act is not sufficiently similar nor close enough in time to be relevant. United States v. Fierson, 419 F.2d 1020, 1022 (7 Cir. 1969). See McCormick, Evidence Sec. 157, at 327, n.2 (1954); Wigmore, Evidence Sec. 302 (3d Ed. 1940) (cases admitting prior criminal acts as evidencing intent); Weinstein and Berger, Weinstein's Evidence Vol. 2, Sec. 404 [08] at 404-45.

The area of challenge in this case is with respect to whether subsequent acts which transpired in January of 1980 can be fairly characterized as being probative of intent on August 22, 1979. Several circuits have adopted an interpretation of Fed.R.Evid.404(b) which permits admission in certain contexts of subsequent acts of a defendant as proof of his intent at an earlier time. See, United States v. Bermudez, 526 F.2d 89, 95 (2 Cir. 1975); United States v. Mack, 643 F.2d 1119, 1121-1122 (5 Cir. 1981);

United States v. Childs, 598 F.2d 169, 173 (D.C. Cir. 1979); Pacelli v. United States, 588 F.2d 167, 173 (D.C. Cir. 1979); United States v. King, 587 F.2d 956, 962 (9 Cir. 1978); United Sttes v. Gallo, 543 F.2d 361, 364 (D.C. Cir. 1976). The analytical underpinning of the cases in which admission of "subsequent other crimes" evidence has been affirmed is faulty.

With respect to the clear untrustworthiness of admission of subsequent act evidence, United States v. Boyd, 595 F.2d 120 (3 Cir. 1978), is particularly instructive. In that case, the Third Circuit flatly rejected an interpretation of Fed.R.Evid.404(b) which admits subsequent other crimes evidence. In Boyd, the trial court admitted testimony of an undercover officer that on three days after expiration of the conspiracy charged in the indictment, which concerned the manufacture and distributin of methamphetamine, he discussed with one defendant a purchase of drugs and tht more than two months after the conspriracy he met with another defendant for a similar purpose. In finding reversible error, the Boyd Court stated:

> ...The logic of showing prior intent or knowledge by proof of subsequent activity escapes us. Nor

> do we understand how, logically, a post-conspiracy purchase of a chemical ingredient tends to prove modus operandi of the prior manufacturing operation. [595 F.2d at 126]

In regard to the ineffectiveness of a limiting instruction, as to the rights of codefendants, the Boyd Court stated:

> The trial court gave an instruction limiting the use of [the] testimony to Parr and Lipton, and to the specific purpose of proving that they were members of the conspiracy. Once Parr and Lipton were connected to the conspiracy, however, their out-of-court statements could be considered by the jury against codefendants. Thus, the court's admonitory instruction was, we believe, wholly ineffective in insulating the codefendants in from the prejudicial effects of Goff's testimony. [595 F.2d at 127].

We believe that Boyd is representative of the most cogent position respecting the relevance of subsequent act evidence. Cf. United States v. Jimenez, 613 F.2d 1573,

1376 (5 Cir. 1980) ; United States v. Powell, 587 F.2d 443, 449 (9 Cir. 1978). Accordingly, we urge this Court to adopt the position of the Third Circuit in United States v. Boyd, supra, and reject as constitutionally infirm the interpretation of Fed.R.Evid.404(b) which permits admission of evidence of subsequent criminal acts as proof of intent on an earlier occasion. The inappropriate use of subsequent act evidence in this case is illustrative of the need for a strict rule. An analysis of the eivdence indicates that it was not demonstrated to be relevant as to any issue in dispute. The particular acts were wholly non-probative as to Sec.201 intent on August 22, 1979. The January meetings were merely evidence of a new plan to fleece the Sheik.

Petitioner Myers was the only defendant to testify at trial. In essence, the defense which he presented was that he was playacting and did not accept the money in return for being influenced in his official acts. The jury was instructed that a finding of playacting warranted acquittal. Myers was recruited by the other defendants to merely meet with the Sheik. Prior to the meeting, he was coached by Errichetti to come on strong. There was no clear evidence to the contrary. The government basically

relied on the testimony of Weinberg and Amoroso and the videotape. Weinberg and Amoroso testified that it was made clear to Errichetti that the [fictitious] Sheik would have an expectation of favor subsequent to payment of the money. (T1064S-5 to 14; T1675-3 to 5). However, there were no tapes or other evidence supporting this proposition. Contrarily, Ellis Cook, an immunized witness of the government, who was also an unindicted co-conspirator, testified that the understanding of the group was tht the Congressman would not be required "to do something [in return]." (T1138-5). Viewed in this light, it is clear that the government was hard-pressed on the basis of the evidence which it generated to prove Sec. 201 intent. Its exclusive means of proof was the videotaped performance which by itself was proof of an actus reus but standing alone was hardly convincing proof of a Sec. 201 mens rea in light of the Congressman's playacting defense which was accepted by the trial court. Therefore, the tape at trial merely resulted in the jury having to determine whether a duly-elected Congressman was truthful in stating that on August 22, 1979 he was playacting. While the Congressman could not retain

his honor in view of the tape, he could nonetheless place his credibility before the jury with respect to the narrow issue of Sec. 201 intent.

This dilemma stemmed from the government's ABSCAM modus operandi. The government did not contemplate as part of its investigation that the Congressman would be approached and actually requested to exert some influence. (T1046-5 to 8). The Congressman's response to such an approach, absent tapes concerning what he was told by middlemen, would be the only reliable evidene of intent.

Resolution of the dilemma by the trial court and the government was in the form of admission of evidence of the subsequent acts. Petitioner Myers did not contest that he participated in a plan to fleece the Sheik. He, as all the other defendants, did contest the issue as to a Sec. 201 intent on August 22, 1979. The subsequent acts did not to any degree elucidate the issue of a Sec. 201 intent on an earlier occasion. Those acts at best merely cumulatively demonstrated the plan to take money. The result of their admission, under circumstances where they bore no relevancy respecting the issue of Sec. 201 intent on

August 22, 1979 was to indicate to the jury tht petitioner Myers and Criden had criminal dispositions.And, since petitioners Johanson and Errichetti were involved with them, they too must have such a disposition.

Admission of the wholly irrelevant subsequent act evidence in this case resulted in the jury hearing from the mouth of a United States Congressman statements concerning corruption in all areas of the City of Philadelhia, including the Mayor and City Council and Atlantic City. Those acts also incorported references to the Mafia and improprieties in Washington and throughout the fabric of government. There is no basis upon which it may be argued tht improper admission of such evidence may under any circumstances be deemed harmless. Indeed, the sheer number of the areas of corruption which were referred to would in itself overwhelm a jury. United States v. Krezdorn, 639 F.2d 1327, 1331 (5 Cir. 1981). In short, the evidence merely tended to demonstrate a propensity toward crime and to shock the jury's conscience.

We submit that the erroneously admitted evidence was of such a character tht it precluded fair consideration of petitioners' cases by the jury. Even

assuming that subsequent act evidence is admissible under certain circumstances, the subsequent acts in this case were clearly more prejudicial than probative. Indeed, they were fatally prejudicial.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant this petition for certiorari.

Respectfully submitted,

s/R.A.B.
RAYMOND A. BROWN

s/H.F.F.
HENRY F. FURST

ALAN DEXTER BOWMAN

STEVEN H. GIFIS

s/N.J.
NEIL JOKELSON

ALAN DEXTER BOWMAN
STEVEN H. GIFIS
HENRY F. FURST
NEIL JOKELSON
ROCHELLE NEWMAN

ON THE PETITION

DATED: January 14, 1983